In the Supreme Court of the United States

OCTOBER TERM 1945.

No. 1215.

MAX D. GUSTIN,
Administrator,
Petitioner,

v.

SUN LIFE ASSURANCE COMPANY OF CANADA,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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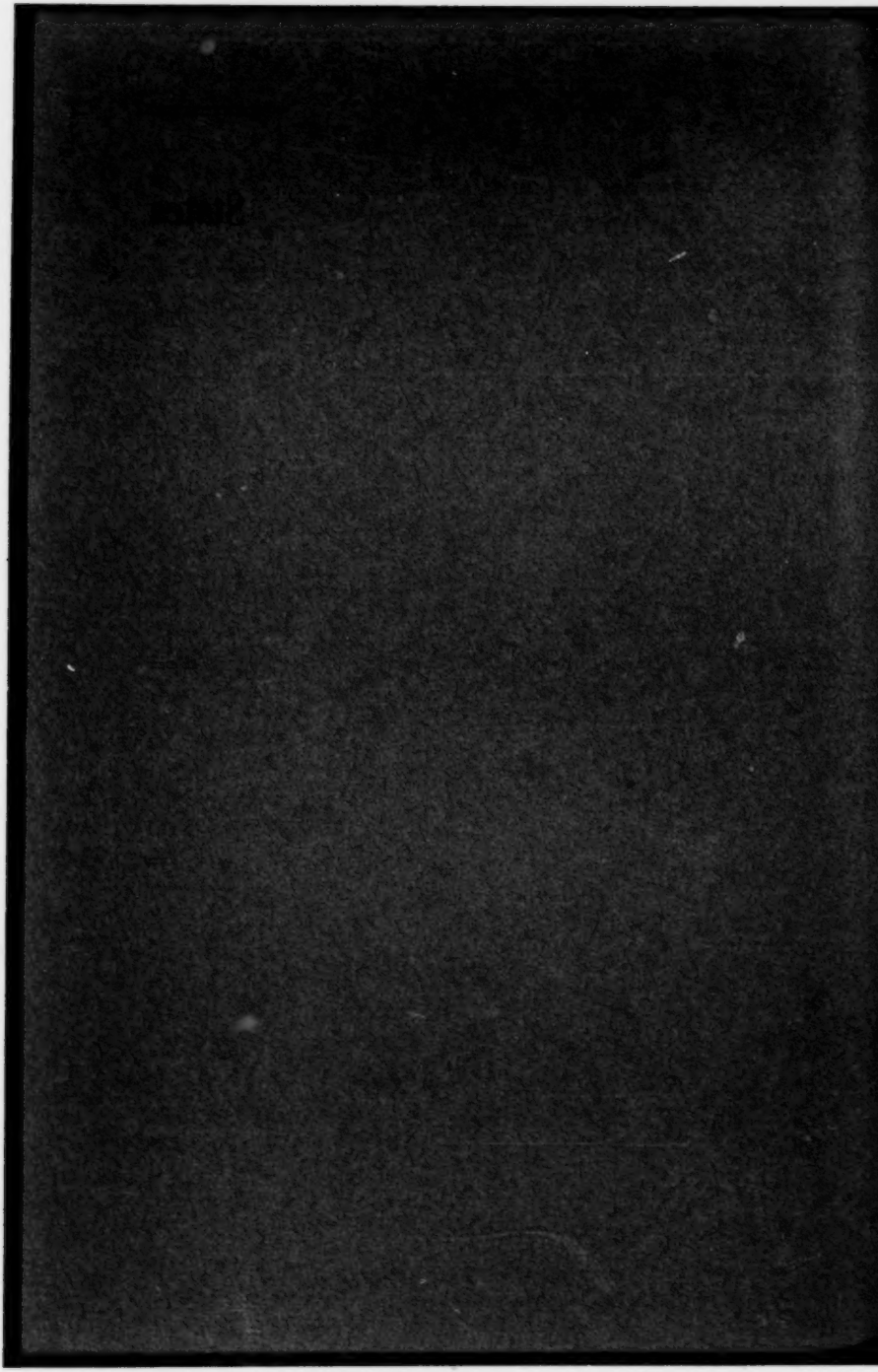

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NATURE OF THE CASE.

At page 2 of Petitioner's brief, there appears a summary statement of the case which does not sufficiently disclose the issues presented in the courts below.

The basic question is whether or not Respondent was entitled to charge interest as it did following universal practice among insurance companies, in the light of the insurance policy, a series of subsequent agreements in connection with loans, and the law of Ohio which controls the parties' contractual rights.

There are a number of grounds upon which the validity of Respondent's computation of interest may be sustained:

(1) The law fastens upon the insurer the duty to keep a policy in force and to avoid defaults.* The insured's non-

* See: Ohio General Code, sec. 9420(7):

"* * * It shall be further stipulated in the policy that *failure* to repay any such advance or *to pay interest shall not avoid the policy* unless the total indebtedness thereon to the company shall equal or exceed such loan value * * *." (Emphasis supplied.)

payment of annual interest requires either a default or an additional advance or loan by the insurer to meet the installment of interest when due. Respondent entered on its books additional loans covering unpaid annual installments of interest in this case. If Respondent was entitled to charge interest on these loans as the policy entitled it to do on all loans, the judgments below were correct.

(2) Upon the occasion of each loan (8 in number) made to the insured, he and Respondent entered into a formal loan agreement specifically providing for computation of interest in the way that it was actually computed.

(3) These loan agreements were supported by consideration because the policy gave Respondent the right to charge annual interest in advance, and in each loan agreement Respondent relinquished this right and, to the insured's advantage, allowed annual interest to be payable in arrears or currently.

(4) All but two of the loan agreements were entered into after the enactment of Ohio General Code, Section 9421-2, which specifically required the computation of interest in the way Respondent computed it here, and which statute reads:

> "In ascertaining the indebtedness due upon policy or premium loans, the interest, if not paid when due, shall be added to the principal of such loans and shall bear interest at the rate specified in the note or loan agreement."

(5) Since the insured entered into and executed eight loan agreements providing for computation of interest in the manner urged by Respondent, and each of these loan agreements included a statement of his loan account to the date thereof, the insured is now estopped from challenging the computation procedures and there has been a number of stated accounts between the parties.

The above are the principal points which, with others, were urged on the District Court and Circuit Court of

Appeals. Each of the points urged is supported by the Ohio law and the weight of authority in other jurisdictions.

DECISIONS IN THE COURTS BELOW.

Both parties moved for summary judgment in the District Court. The motion of Defendant-Respondent was granted.

In his memorandum opinion, District Judge Jones, for many years an Ohio Common Pleas Court judge and judge of the Northern District of Ohio, pointed out that Respondent's computation of interest conformed to the series of loan agreements, that their language indicated interest was to be paid each year or the amount thereof added to the total loans against the policy, and that the insured knew how computations of interest were being made and made no objection. Judge Jones, in his memorandum opinion overruling motion for new trial, found there was valid consideration for the loan agreements in the relinquishment of Respondent's right of collection of interest in advance. The Judge remarked: "The cases cited by the plaintiff (Petitioner) in support of his motion for a summary judgment do not convince me that such is the law in Ohio under the facts of this case." It is to be noted (R. 115) that the District Judge decided the motions for summary judgment without considering the affidavits by which the case of *Johnson v. Penn Mutual Life Ins. Co.,* was presented. Consequently, this case, which Petitioner now claims cannot properly be considered by the Circuit Court of Appeals, was avowedly not a factor in the District Court's decision.

It is Respondent's contention that the decision of the Circuit Court of Appeals, on the questions of consideration for the loan agreements, on the applicability of Ohio General Code Section 9421-2, and on the issue of estoppel, is at variance with Ohio law as well as with previous decisions of the same court (Cf. *Johnson v. Penn Mutual Life Ins. Co.,* 31 F. Supp. 394, aff., 6 Cir. 108 F. (2d) 1014, mem.,

where the issue in the present case was presented; *State Mutual Assurance Co. v. Briscoe,* 6 Cir. 107 F. (2d) 977, 979, and *Moss v. Aetna Life Ins. Co.,* 6 Cir., 73 F. (2d) 339, both holding that a loan agreement becomes an executed contract when the indebtedness exceeds the loan value and hence no consideration is necessary to support such agreement).

The Ohio law does not present a precedent for the present case in all its issues. However, on several issues, which would require disposition of the case in Respondent's favor, there is sufficient settled Ohio law to support the result reached by the Circuit Court of Appeals in this case.

It is to be expressly noted that the opinion of the Circuit Court of Appeals as distinguished from the result was not shared by Circuit Judge Simons, who limited his concurrence to the judgment, namely, affirmance of the judgment for Respondent. This implies that Judge Simons agreed with District Judge Jones, but did not share the limited basis of decision expressed by Circuit Judge Allen and to be implied by the silence of Circuit Judge Hicks. Thus, it is by no means clear that if the point were raised, the Circuit Court of Appeals would limit its ground for decision to the unreported case of *Johnson v. Penn Mutual Life Ins. Co.*, which Petitioner now claims must be ignored because of Ohio General Code, Section 1483.

Petitioner did not urge the application of Ohio General Code Section 1483 in the District Court, nor in the Circuit Court of Appeals until after the decision had been rendered. This statute, which has been in force since 1919 —some 28 years, was first urged by Petitioner on rehearing. Circuit Judge Allen, who wrote the principal opinion and that on rehearing, was a Judge of the Ohio Supreme Court for twelve years during which the statute in question was in force, and since that time has had frequent occasion to deal with Ohio law. It would seem to be specious criticism for Petitioner to argue that Circuit Judge Allen is

not thoroughly familiar with the Ohio law on this subject, the uniform attitude of Ohio Supreme Court judges and Ohio Courts of Appeals judges toward this statute, as well as with the wide publicity given the statute in the literature, and discussions of this subject which have issued from or taken place in various bar association and other professional groups in the State of Ohio.

Further discussion of Ohio General Code Section 1483 follows.

OHIO GENERAL CODE, SECTION 1483.

This statute, striking as it does at the root of jurisprudence, namely, the principle of precedent as expressed in the doctrine of *stare decisis,* and infringing upon the inherent power of courts to make rules, seems on its face to be so unreasonable and unenforceable as to be a nullity. But this conclusion is not necessary if the statute, as it must under Ohio law, (*State v. Smith,* 123 O. S. 237, 174 N. E. 768; *Maxfield v. Brooks,* 110 O. S. 566, 102 N. E. 225) be considered *in pari materia,* its purpose, and related statutes taken into account.

Little need be added to the views of Circuit Judge Allen as expressed on rehearing (Record, pp. 145-148). Judge Allen by reason of long experience on the Ohio Supreme Court is familiar with the implications of this statute and the whole problem.

There are several considerations which Respondent offers in addition to Judge Allen's analysis.

Respondent did not present to the Court a list of the sources, in Ohio legal literature, of material pointing out that this statute, being unworkable if literally applied, has been almost unanimously ignored by common consent of the Ohio Bench and Bar. Obviously the presence of this statute in the Ohio General Code has given rise to considerable discussion and debate. See, besides "The Unofficially Reported Case as Authority," Young, 1 O. S. U. L. J. 135

(Record, p. 146) which was referred to by Judge Allen, but not cited to the Court by Respondent, the wide publicity given the statute and the tacit understanding that it should be ignored as unworkable and not literally applied, appearing in: Curtiss, 5 U. Cin. L. Rev. 385, at pp. 389-393 (1931); Trautwein, Ohio Courts and The Reports of Their Decisions (1933), 7 U. Cin. L. Rev. 60, esp. p. 65; Schnee, Reporting Appellate Opinions (1932); 5 Ohio State Bar Assn. Reports, 343, esp. p. 346; 37 Ohio Law Reporter 129 (1932); Feazel, Ohio Case Law (1926), 1 Ohio Jur., p. xv, esp. at pp. xxii-xxiv; Cleveland (Ohio) Bar Association Journal, vol. 10, No. 12 (1939), p. 188.

The pertinent part of the statute (O. G. C. Sec. 1483) was originally promulgated in 1915 (four years before the statute) as part of Rule XII, Rules of Practice of Courts of Appeals of Ohio (5 Ohio App., p. x). However, in 1935, Ohio General Code, Sec. 12223-47 was enacted, empowering "the Courts of Appeals" to "make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the Supreme Court" and which "the Supreme Court may alter and amend such rules and make other and further rules, from time to time as is deemed necessary, for regulating proceedings in any of the courts of the state, * * *." Responsive to that statute, in 1935, the Ohio Courts of Appeals promulgated rules, superseding those of 1915, in which the pertinent part of previous Rule X was omitted. To date the Courts of Appeals Rules do not include any provision for ignoring precedent, and the Supreme Court has not exercised its prerogative under O. G. C. Sec. 12223-47 to impose such a rule upon the Courts of Appeals. Moreover, for many years the statute urged by Petitioner, O. G. C. Sec. 1483, was superseded by O. G. C. Sec. 12248, which required a Court of Appeals to state the ground of its decision of reversal, which latter statute has

been superseded, in 1935, by O. G. C. Sec. 12223-21, which, in part, reads:

> "All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the error or errors found in the record upon which the judgment of reversal is founded."

Concurrently, first, O. G. C. Sec. 12273, and later O. G. C. Sec. 12223-39, were in force; the latter reads:

> "The Court of Appeals or Common Pleas Court so reversing a judgment, upon the request of either party, shall specify in writing the ground or grounds of such reversal, which shall be filed and kept with the papers in the case."

Another ground for the interpretation by the Circuit Court of Appeals, of O. G. C. Sec. 1483, which Respondent did not submit to that court, is the settled principle that a statute which is unworkable, productive of a ridiculous or absurd result, or otherwise unreasonable, is not within legislative powers, is unconstitutional, and unenforceable. This has been the Ohio rule since *Slater v. Cave*, 3 Ohio St. 80, which, at pp. 83-4 holds:

> "It is not necessary to refer to precedent to sustain the position that where the literal construction of a statute would lead to gross absurdity, or where, out of several acts touching the same subject-matter, there arise collaterally any absurd consequences, manifestly contradictory to common reason, the obvious intention of the law must prevail over a literal interpretation, and it is even said that provisions leading to collateral consequences of great absurdity or injustice, may be rejected as absolutely void."

The construction contended for would nullify the rules of *res adjudicata*. Parties could litigate a cause of action to a conclusion, either in the trial or appellate court, in Cuyahoga County, Ohio, and if the Supreme Court re-

porter in the first instance, and the Court of Appeals in the second instance, failed to have the decision and opinion officially reported, there would be nothing to prevent litigating the cause of action all over again, in any other county of the state. This would necessarily be true, because judgment in Cuyahoga County could not "be recognized by and receive the official sanction of any court within the state."

Another point not urged to the Circuit Court of Appeals was that Petitioner's claims for the statute, besides nullifying the doctrines of *res judicata* and law of the case, would upset the fundamental rule of jurisprudence that "a court of record speaks only through its journal." *Squire v. Guardian Trust Co.*, 144 O. S. 266. The data upon which the Circuit Court of Appeals relied for determination of the Ohio law on the precise issue presented was not an opinion, *but was the journal entry and record* of the Court of Appeals for Cuyahoga County, Ohio (R. pp. 137, 60). The recent view of the Ohio Supreme Court, as stated in *Squire v. Guardian Trust Co., supra,* places a court's journal entry on a higher plane than its opinion, apparently without regard to whether the opinion is published, or if so, whether or not officially published. At p. 271, the Ohio Supreme Court, in determining the holding of the Court of Appeals, ignored pertinent expressions in the opinion and held that the Court would, as it "must," confine itself to the judgment entry of the Court of Appeals. And *Coffman v. Coffman*, 76 Ohio App. 330, 333, holds:

> "We can not look to the opinions of the court for refutation of the duly entered findings upon its journal."

Moreover, the journal of a Court of general jurisdiction imports absolute verity. *State ex rel. Kriss v. Richards*, 102 O. S. 455, 132 N. E. 23.

Respondent pointed out to the Circuit Court of Appeals that the Ohio Supreme Court has recognized unofficially reported Ohio cases on innumerable occasions. This recognition takes three forms. First, *Feeman v. State*, 131 O. S. 85, 89, states:

> "Where opinions of the lower courts are available this Court has passed a rule requiring plaintiffs in error to submit the opinions of the lower courts with their briefs; * * *"
>
> (See Ohio Supreme Court, Rules of Practice, Rule II, Sec. 2 (e), Rule VII, Sec. 2 (f), and Sec. 6, Rule VIII, Sec. 3 (e), and Sec. 10, 130 Ohio St. lxx, lxxv, lxxvi, lxxvii, lxxviii.)

Obviously, this requirement results, in the great majority of cases, in the Ohio Supreme Court's consideration of opinions which are not reported at all. This is because the usual time elapsing before an Ohio appellate court decision is officially published, makes it impossible that such opinions required to be submitted to the Ohio Supreme Court for consideration can be officially published opinions. Second, there are numerous instances in recent opinions of the Ohio Supreme Court where the court has cited unofficially reported cases. (For examples, see Appendix A.) Third, and most important, the Ohio law permits a Court of Appeals, upon finding its decision in conflict with that of another Ohio appellate court, to certify the case to the Ohio Supreme Court for decision. On numerous occasions, the Ohio Supreme Court has noted that the Ohio appellate case, upon which the determination of conflict was based, was an unofficially reported or an unreported case. (For examples, see Appendix B.)

Respondent did not point out to the Circuit Court of Appeals that reference to the most recent volumes of the official Ohio Appellate Reports, disclose very numerous instances in these volumes where Ohio Courts of Appeals, for seven of the nine judicial districts, have cited and relied upon either unreported Ohio opinions or unofficially

reported Ohio opinions. The large number of these instances may be noted, under the heading "Ohio Law Astract" in Shepard's Ohio Citations (March, 1946) Vol. XXXVIII, No. 1, for the years 1945 and 1946. (For examples, see Appendix C.)

This frequent and settled practice of the Ohio Supreme Court and Ohio Courts of Appeals of citing unreported or unofficially reported Ohio cases, (which practice has been carried on since the decision on which Petitioner relies), and the omission or refusal of the Ohio Supreme Court to attempt to enforce Ohio General Code, Sec. 1483, makes applicable the Ohio law that a long established and uniform practice is an authority of but little, if any, less weight than an adjudication to the same effect. *State v. Ridgeway,* 73 O. S. 31, 76 N. E. 95.

ABSENCE OF GROUNDS FOR ISSUANCE OF WRIT OF CERTIORARI.

None of the usual grounds for issuance of a writ of certiorari is present in this case. Petitioner does not claim any "special and important reasons" for the review sought. This Court's Rule 38(5)(b) suggests that a writ may be allowed where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." This basis for a writ is not present here and this fact may be determined with almost mathematical precision. Respondent cited to the Circuit Court of Appeals numerous cases where the Ohio Supreme Court has cited and given full weight to unofficially reported Ohio cases. Respondent has herein indicated a large number of instances where Ohio Courts of Appeals have ignored the statute upon which the petitioner relies.

Respondent suggests that whether or not the Circuit Court of Appeals decided an "important question of local law in a way probably in conflict with applicable local

decisions," must be determined in the light of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, and cases following it. The very recent case *Guaranty Trust Co. v. York*, 326 U. S. 99, at p. 109, states:

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a Federal Court instead of in a State Court a block away should not lead to a substantially different result."

The present case was instituted in the Court of Common Pleas of Cuyahoga County, Ohio (R. p. 2) and was removed to the Federal Court, on the grounds of diversity of citizenship. Hence, the criterion of *Guaranty Trust Co. v. York, supra,* has unusual application to the present situation. If the case had not been removed, the Common Pleas Court and the Court of Appeals could not have been expected to depart from the ruling on the precise issue made by the Court of Appeals for Cuyahoga County in the case relied upon by the Circuit Court of Appeals and sought to be eliminated from consideration by Petitioner.

The sole issue raised by this petition for writ of certiorari is whether or not the court below has determined the law of Ohio properly with respect to the statute in question, that is, whether or not the Ohio courts would have relied upon the decision in question despite O. G. C. Sec. 1483. Both the Ohio Supreme Court and a majority of the Ohio Courts of Appeals have declared in effect that the significance of the statute in question is exactly as described by the Circuit Court of Appeals. The Circuit Court of Appeals followed the decision of the Ohio Court of Appeals whose decision would have controlled the case if it had not been removed to the District Court; the Ohio Supreme Court, having overruled motion to certify and denied an appeal of right in the case which the Circuit Court of Appeals followed, is satisfied with the decision relied upon as precedent. The courts of Ohio having clearly indicated

the Ohio law and practice on the question involved and the court below having followed the local law, there is no question before this Court.

Respectfully submitted,

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